

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL)
DEVELOPMENT PERMIT DENIED BY)
WHATCOM COUNTY TO SCOTT PAPER)
COMPANY,)
SCOTT PAPER COMPANY,)
Appellant,)
v.)
WHATCOM COUNTY,)
Respondent.)

SHB No. 88-20

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter is the request for review of Whatcom County's denial of a shoreline substantial development permit to Scott Paper Company.

The matter came on before the Shorelines Hearings Board, Wick Dufford, Chairman, Judith A. Bendor, Nancy Burnett, Richard Gidley and Steven W. Morrison, Members. William A. Harrison, Administrative Appeals Judge, presided. The hearing was conducted at Mt. Vernon on December 8 and 9, 1988.

ORDER

The denial by Whatcom County of Scott Paper Company's application for a shoreline permit is hereby vacated, and the matter is remanded for further proceedings consistent with this decision.

DONE at Lacey, WA, this 8th day of March, 1989.

SHORELINES HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Chairman

Judith A. Bendor

JUDITH A. BENDOR, Member

Nancy Burnett

NANCY BURNETT, Member

Richard Gidley

RICHARD GIDLEY, Member

Steven W. Morrison

STEVEN W. MORRISON, Member

William A. Harrison

WILLIAM A. HARRISON

Administrative Appeals Judge

FINAL FINDINGS OF FACT,
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1 Appellant Scott Paper Company appeared by Daniel D. Zender,
2 Attorney at Law. Respondent Whatcom County appeared by Randall J.
3 Watts, Chief Civil Deputy Prosecuting Attorney. Reporter Dorothy E.
4 Cochrane recorded the proceedings.

5 Witnesses were sworn and testified. Exhibits were examined. The
6 Shorelines Hearings Board makes these

7 FINDINGS OF FACT

8 I

9 This case arises in Whatcom County on Baker Lake.

10 II

11 On July 7, 1987, appellant Scott Paper Company, applied to
12 respondent Whatcom County, for a shoreline substantial development
13 permit to operate a barging system across the upper end of Baker
14 Lake. The barge system would transport timber. Specifically, Scott
15 owns some 600 acres on the south side of the Lake of which it proposes
16 to clearcut 160 acres. The logs cut from that 160 acres would be
17 loaded onto logging trucks. Each truck would drive onto the barge. A
18 diesel tug would push the barge to the north side of the Lake. The
19 truck would drive off the barge and carry the logs to market.
20 Returning empty, trucks would cross the Lake from north to south via
21 barge, and then pick up and remove more logs as just described.

22 III

23 Under the State Environmental Policy Act (SEPA), chapter 43.21C
24

25
26 FINAL FINDINGS OF FACT,
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1 RCW, Scott also furnished Whatcom County with an environmental
2 checklist showing the environmental effects of the barging system. As
3 to the logging, the checklist stated:

4 "The completed road segments over shorelines will
5 be used during logging coperations to be conducted on
6 portions of Scott Paper Company ownership in Sections
7 2, 3 and 10 of Township 37 North, Range 9 East, WM.
8 This logging operation is completely outside
9 shorelines jurisdiction. A Forest Practices
10 Application and SEPA checklist for a 160-acre clearcut
11 have been or soon will be filed.

12 On August 7, 1987, Whatcom County issued a determination of
13 non-significance based upon the checklist for the barging system only,
14 and not the logging.

15 IV

16 On November 23, 1987, the barging system shoreline permit was
17 granted, with conditions, by the Whatcom county Hearing Examiner.

18 V

19 The decision of the Hearing Examiner was appealed by the Friends
20 of Noisy Creek to the Whatcom County Council. On March 22, 1988, the
21 Whatcom County Council reversed the grant of the permit by the Hearing
22 Examiner, thereby denying the permit.

23 VI

24 Scott now appeals from the Whatcom County shoreline permit denial
25 by request for review filed before us on April 27, 1988.

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(3)

VII

The Scott timber land, including the north and south shore terminals of the barge proposal are inholdings surrounded by National Forest. The northern barge landing is located between the privately operated Baker Lake Resort and the Shannon Creek Campground (U.S.F.S.). The southern barge landing and timber land is bordered by both National Forest and the Noisy Diobsud Wilderness Area.

VIII

The proposed barge landings on both sides of the Lake would include an area of crushed rock extending out onto the lakebed far enough to assure solid access for a truck driving onto or leaving the barge. A new road segment is proposed on the south side of the Lake connecting the barge landing with an upland road proposed for redevelopment. A road already exists on the northern side of the Lake to serve the barge landing there. Scott does not presently allow public access to its north shore property. Scott has offered to convey its north shore property to a public entity for public use while reserving the right to remove timber over it. This offer is contingent upon approval of the barge proposal. A trail along Scott's south shoreline would likewise be opened to the public as part of this proposal.

IX

The barge operations would be conducted weekdays only during

1 daylight hours. Scott estimates that the 160 acres of timber could be
2 barged out in one season beginning in April and ending in November.
3 Scott has no present plans regarding the harvest of its timber in the
4 south shore tract beyond the 160 acres. However, Scott would reserve
5 the right to reactivate barging to take out more timber after barging
6 out the 160 acres.

7
8 X

9 Scott anticipates 12 round trips per day for the barge. The
10 barge would hold two log trucks. The barge would be 80 feet long. A
11 diesel tug 26 feet long would push the barge. The combined vessels
12 thus span 106', and would be placed in service on a crossing 1 1/2
13 miles wide. Each crossing would take 30 minutes if loaded with logs
14 and 20 minutes if returning empty.

15 XI

16 The 100 horsepower V-8 diesel tug would produce noise of a
17 maximum of 85 decibels. By comparison, motor boats used for
18 recreation produce 70-95 decibels. The noise from the proposed barge
19 tug would be comparable to recreational boats now using the Lake.

20 XII

21 Public notice of barge operations plus conventional navigation
22 lights or markers on the vessels would avoid undue risk of collision
23 or conflict with recreational boaters and sea planes.

XIII

Appropriate oil containment booms, instruction in their use and ready availability of the booms would avoid the risk of significant harm from oil spill.

XIV

Baker Lake is sufficiently large in size to be deemed a "shoreline of state-wide significance" as that term is used in the Shoreline Management Act. See RCW 90.58.030(2)(e)(iv).

XV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

A shoreline permit decision, whether a grant or denial, must follow compliance with the State Environmental Policy Act (SEPA), chapter 43.21C RCW. Another forum, the State Forest Practices Appeals Board, has determined that this barging development is part of the greater logging proposal, and that the total proposal requires preparation of an environmental impact statement (EIS). Until this EIS is prepared, SEPA is not complied with, and a shoreline permit decision cannot be made. The present shoreline permit decision, based upon a DNS, should therefore be vacated and the matter remanded for further proceedings.

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II

We take official notice of Seattle Audubon Society, et. al. v. Department of Natural Resources and Scott Paper Company, FPAB No. 87-5 (1989) which is the decision reached by the State Forest Practices Appeals Board referred to above. It was held there that Scott's proposal, under SEPA, was not only for timber harvest, but also for timber transport, once harvested. Id., Conclusion of Law VII. We concur that Scott's proposed timber harvest cannot proceed without transportation and the actions necessary for transportation cannot logically be undertaken in the absence of the timber harvest. Under WAC 197-11-060(3)(b)(i) or (ii) of the SEPA rules,¹ both harvest and transportation should have been discussed in the same environmental checklist and threshold determination and now should be addressed in the same environmental impact statement.

¹ WAC 197-11-060(3)(b)(i) and (ii) of the SEPA rules provides:
(b) Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection (5).) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:
(i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
(ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

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III

The matter has been remanded to the State Department of Natural Resources for preparation of an EIS on the entire proposal including timber harvest and transport. Seattle Audubon, supra, Conclusion of Law VIII and Order. By the same reasoning, this shoreline permit decision should await consideration of that EIS by Watcom County.

IV

While we concur, as set forth above, with the reasoning of Seattle Audubon, supra, we would lastly conclude that the same result might be required under principles preventing the relitigation of determinative facts. Proedural compliance with SEPA was adjudicated and found lacking in Seattle Audubon. In that case, also, the proposal under SEPA was found to encompass this barge proposal. Therefore, the very decision in Seattle Audubon might properly be construed to estop the parties, in this collateral action, from litigating a barge permit decision, which collapses with the adjudication of non-compliance with SEPA. We note in this respect that Scott was a party in Seattle Audubon and that County could be deemed in privity with DNR, another party in Seattle Audubon, as the County and DNR share permitting authority. We hold in the alternative that the remand which we make today is required by the doctrine of collateral estoppel. See McDaniels v. Carlson, 108 Wn.2d 299, 303, 738 P.2d 254 (1987) and U. S. v. I.T.T. Rayonier, 627 F.2d 996, 1003 (1980).

V

In summary, this shoreline permit denial should be vacated and the matter remanded to the County for consideration of DNR's EIS on the entire proposal, including timber harvest and transport.

VI

Upon remand, Whatcom County must fully consider the EIS and other public comment. For the guidance of the parties, however, it appears to us from the evidence presented in this case that the greater concern over the proposal lies with the timber harvesting itself. Looking only at the evidence in this case, which does not include an EIS, it appears to use that the barging operation, if carefully conditioned and conducted, would not necessarily conflict with the Shoreline Management Act or Whatcom County Shoreline Master Program.

VII

Any Finding of Fact deemed to a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this